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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 120

UNITED STATES OF AMERICA, PETITIONER

v.

GUARANTY TRUST COMPANY OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 14) is not reported. The opinion of the Circuit Court of Appeals (R. 19–23) is reported in 69 F. (2d) 799.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 19, 1934 (R. 23). The petition for writ of certiorari was filed June 19, 1934, and was granted on October 8, 1934. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the laws of the foreign country or the laws of the American jurisdiction govern the rights and obligations of the drawer-drawee and of a subsequent American endorsee in the case of a check drawn and payable in this country to a foreign payee and transferred under a forged endorsement in the foreign country.

2. Whether the last endorsement made in New York on such check, "previous endorsements guaranteed", imports a guarantee of the genuineness of the prior endorsements as well as a guarantee of title.

STATUTES INVOLVED

The applicable statutes are set forth in the Appendix, *infra*, pp. 18–19.

STATEMENT

The case was presented in the District Court on stipulated facts (R. 5–27), which may be summarized as follows:

A check in the amount of $160, dated October 29, 1921, was drawn in Washington on the Treasurer of the United States, to the order of Louis Macakanja, 37 Sasava Kot Glina, Z. P. Maja, Jugo-Slavia, and mailed to the payee (R. 6). The check bears the purported endorsement of the payee made in Jugo-Slavia, and was transferred and delivered on or about November 30, 1921, to the Merkur Bank of Jugo-Slavia for a valuable

consideration (R 6). The purported endorsement of the payee is a forgery (R. 6). The Merkur Bank received the check in good faith and without being guilty of any negligence (R. 7), and thereafter duly endorsed the check and transferred and delivered it to the Slavenska Bank, D. D., Zagreb, in Jugo-Slavia, for a valuable consideration (R. 7). The Slavenska Bank received the check in good faith and without notice of the forgery (R. 7). On or about December 3, 1921, the Slavenska Bank endorsed and mailed the check to the respondent, which received it on or about December 21, 1921, in good faith, for value and without notice of the forgery (R. 8). The respondent, upon receipt of the check, stamped its endorsement on the back of the check and presented it to the Federal Reserve Bank of New York for collection. The respondent's endorsement contained the words "previous endorsements guaranteed." (R. 8.) The Federal Reserve Bank sent the check to the Treasurer of the United States for payment (R. 9). Upon receipt of the check the Treasurer of the United States paid it by crediting the Federal Reserve Bank of New York with the amount and the Federal Reserve Bank of New York in turn credited the amount to the respondent (R. 12). It was later discovered that the payee's endorsement was forged, and the petitioner thereupon requested reclamation, through the Federal Reserve Bank of New York, from the respondent (R. 12).

The law of the Kingdom of Jugo-Slavia in reference to checks and bills of exchange is as follows (R. 8):

> Upon the negotiation and transfer of a check or bill of exchange each transferee, endorsee, or holder thereof obtains a good title to the instrument and acquires the right to collect and retain the proceeds thereof, even though the endorsement of the payee is forged where
>
> (a) the instrument purports to bear a chain or series of endorsements from the payee of the instrument to the transferee, holder or endorsee thereof; and
>
> (b) the said transferee, holder or endorsee gives valuable consideration for the instrument; and
>
> (c) the said transferee, holder or endorsee takes the instrument without actual notice of any forgery or other defect in the instrument and is not guilty of any fraud or gross negligence in taking the instrument.

The law of Jugo-Slavia further provides that—

> (a) when an endorsement follows a blank endorsement there is a presumption of law that the person who executed the endorsement has acquired title to the instrument under the blank endorsement; and
>
> (b) the transferee, holder or endorsee of the instrument is under no duty or obligation to investigate the genuineness of prior endorsements.

Under the law of Jugo-Slavia an endorser does not guarantee or warrant the genuineness of prior endorsements.

The law, as above stated, was in 1921 and still is in full force and effect in Jugo-Slavia.

The District Court entered judgment in favor of the petitioner for the amount of the check and interest (R. 15). The Circuit Court of Appeals reversed (R. 23).

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

1. In reversing the judgment of the District Court.

2. In holding that the law of the place of foreign transfer governs the rights of an endorsee as against the drawer-drawee of an American check.

3. In holding that the respondent's title to the check, although acquired under a forged endorsement, authorized the respondent to demand and receive payment of the check in this country.

4. In holding that the respondent's endorsement, "previous endorsements guaranteed", was a guarantee of title merely, and not of the genuineness of prior endorsements.

SUMMARY OF ARGUMENT

I

The United States issued its check in the District of Columbia and payment was to be effected there. The laws of the District of Columbia, there-

fore, control the obligations of the contract. These laws provide that no obligation is incurred where the name of the payee of the instrument is forged, as occurred in the instant case. The respondent, in the absence of an endorsement by the payee of the check, may have acquired title thereto, but did not take as a holder in due course, nor did it acquire a negotiable instrument. It took title to the instrument subject to all defenses which the drawer of the check was entitled to advance, including both that of forgery of the payee's signature and that of failure of consideration. The money, having been mistakenly paid by the United States without any obligation on its part so to do, is recoverable.

II

The respondent guaranteed all prior endorsements on the check. The Negotiable Instruments Law of New York, which controls the obligations of the endorsement, provides that an endorsement of this nature warrants, not only title, but also the genuineness of all prior endorsements. The fact that the respondent had title to the instrument did not relieve it from its warranty of the genuineness of prior endorsements. In addition thereto, the Treasury regulations governing the payment of checks require that all prior endorsements of a check be guaranteed by the receiving bank. The obvious purpose of this requirement is not only to make certain that the receiving bank has title to

the check, but also to make certain that the check has discharged the purpose for which it was drawn. The respondent, therefore, having warranted a prior endorsement which is now conceded to be a forgery, is liable to the United States for the amount received by it from the United States in payment of the check.

ARGUMENT

I

It is conceded that had the endorsement of the payee been forged in this country, subsequent holders would have acquired no title to the check, and the United States under the laws of the District of Columbia could have recovered upon the theory that the respondent had no right to receive payment on the check. The respondent, however, urged, and the court below found, that notwithstanding the forgery of the payee's signature, under the laws of Jugo-Slavia title to the check had passed to the transferor of the respondent; that the respondent had good title to the check, and had, therefore, the right to collect from the Treasury the amount set forth in the instrument. This ruling, we submit, rests upon a misconception both of the contractual obligations assumed by the United States in issuing the check, and the rights of the owner of the check.

In the case at bar, the United States issued a check by which it directed its Treasurer to pay a

certain sum of money to Louis Macakanja, or his order. The check was both drawn and payable in the District of Columbia. The *lex loci contractus* and the *lex loci solutionis* are identical, and the laws of the District of Columbia therefor govern the obligations of the contract. *Hutchinson* v. *Ward,* 192 N. Y. 375, 379; Cf. *Cox* v. *United States,* 6 Pet. 172, 203; *Scudder* v. *Union National Bank,* 91 U. S. 406, 412.

The issuance of the check constituted a contract whereby the United States agreed to pay a sum to the payee or his order, and had the United States refused so to do, undoubtedly the payee or his order could have enforced this contract against the United States. Admittedly, neither the payee nor his order received the money. However, under the laws of Jugo-Slavia, in which country the payee's signature was forged to the check, subsequent holders for value without notice of the forgery acquire good title, and it may be that the title acquired by the respondent is one which would be recognized by the courts of this country in an action where the question of title alone is involved. But although the law of the place of transfer may govern the validity of the transfer and the rights as between the transferees, it cannot enlarge the liability of the drawer-drawee under the laws of a jurisdiction where the check was both drawn and payable. Lorenzen, *The Conflict of Laws Relating to Bills and Notes,* 1919, p. 134; *Pritchard* v. *Nor-*

ton, 106 U. S. 124, 133; *Ory* v. *Winter,* 4 Martin N. S. (La.) 277.

The Code of Laws of the District of Columbia (Title 22, Section 24, *infra,* p. 18) provide that where a signature is forged it is wholly inoperative, and no right to enforce payment can be acquired under such signature. Where, therefore, the United States contracted to pay this sum of money in the District of Columbia, it must be held to have assumed only such obligations as were imposed by the laws of the District of Columbia. But under these laws a forged signature is inoperative and no right to enforce payment can be acquired under such signature. The United States, therefore, did not contract to pay this check, should the signature of the payee therein be forged. It therefore follows that, inasmuch as the signature of the payee was forged, no contractual liability existed on the part of the United States to pay to the holder of the check the sum called for therein. This sum was improperly paid to and received by the respondent. The respondent may have had title to the check, but it did not possess any enforceable right against the United States.

There is no contradiction in the conception that an individual may have legal title to an instrument purporting to be negotiable, but still have no enforceable rights against the maker thereof. It finds its analogy in cases where the holder of a negotiable instrument has title to a paper but no

enforceable rights against the maker or drawer thereof. In certain cases an intervening discharge in bankruptcy deprives the holder of a negotiable instrument of an enforceable right against the drawer of the instrument. *Blackwell* v. *Farmers & Merchants National Bank,* 97 Texas, 445. See Section 63 of the National Bankruptcy Act. In certain cases where the death of the drawer of a check occurs before payment, the payee has title to the check but no enforceable right. *Weiand's Administrator* v. *State National Bank of Maysville,* 112 Ky. 310; *Pullen* v. *Placer County Bank,* 138 Cal. 169; Daniel on *Negotiable Instruments,* 4th Ed., Sec. 1618(b). Likewise, the owner of a negotiable instrument, acquiring title thereto after maturity, takes such instrument subject to any defense which the maker or drawer may have, and may in certain circumstances have no enforceable rights while possessing title. *Beneficial Loan Association* v. *Hillery,* 95 N. J. L. 271; *State ex rel. Hadley* v. *Greenville Bank,* 187 S. W. (Mo.) 597. It is submitted that the respondent stands in no better position than the holders of negotiable paper in the instances herein set forth.

There exists likewise another and compelling reason whereby the United States should succeed in the instant case. Obviously, the forgery of the payee's name constituted no endorsement, and the check did not constitute a negotiable instrument until such endorsement was made. Title 22, Section 60, of the Code of Laws of the District of Columbia, *infra,* p.

18. Although the title to the instrument itself thereafter passed in Jugo-Slavia to holders without notice and for valuable consideration, they did not acquire a negotiable instrument, nor were they or the respondent holders in due course. When the check was presented it was subject to any defenses which might be urged or advanced by the drawer thereof. Section 49 of the Negotiable Instruments Act. *Mayers* v. *McRimmon,* 140 N. C. 640; *Meuer* v. *Phoenix National Bank,* 94 App. Div. 331, 334, affirmed, 183 N. Y. 511. See *Goshen National Bank* v. *Bingham,* 118 N. Y. 349. The respondent, therefore, did not in fact possess a negotiable instrument, but only had title to the paper, subject to any defense which the drawer of the instrument might assert. Obviously, had the facts been known to it, the United States would have been entitled to refuse to pay on the grounds that the check had been issued in payment of an obligation, that that obligation had not been satisfied, and that therefore there was failure of consideration, and likewise the forgery of the payee's signature would have constituted a complete and adequate defense to any such claim advanced by the respondent.

In support of its opinion, the court below cited as precedents *Embiricos* v. *Anglo-Austrian Bank,* 1 K. B. (1905) 677, and *Weissman et al.* v. *Banque de Bruxelles,* 254 N. Y. 488. We submit that the proper interpretation of these cases discloses that they are not analogous to the case at bar.

In the *Embiricos* case, the action was one for damages for conversion brought against the endorser by the payee who had already endorsed the bill. The action therefore was on the auxiliary contract endorsement, and not on the original contract of the drawer. See *Everett* v. *Vendryes,* 19 N. Y. 436; *Robertson* v. *Burdekin,* 6 Dunlop 17. There is also present the distinction that the bill in the *Embiricos* case was a foreign bill of exchange, while in the instant case the check is an inland bill of exchange. See opinion of Romer, L. J., in the *Embiricos* case. The same distinction obtains in the *Weissman* case.

We submit, therefore, that the court below was in error in holding that the obligation of the contract was not governed by the laws of the District of Columbia, that the check in question constituted a negotiable instrument when it was acquired by the respondent, or that respondent was entitled to receive payment on the instrument from the United States.

II

Aside from the fact that the United States is entitled to recover from the respondent for the reasons set forth in Point I of this brief, it possesses an additional ground for recovery by reason of the fact that the respondent stamped upon the check "previous endorsements guaranteed."

The obligation of the respondent under its contract of endorsement is governed by the law of the

place where the contract of endorsement was made, that is, of New York. *Spies* v. *National City Bank,* 174 N. Y. 222, 225. Sections 115 and 116 of the Negotiable Instruments Law of New York (*infra,* p. 19) provide that every endorser who endorses without qualification warrants (1) that the instrument is genuine and in all respects what it purports to be; (2) that he has good legal title to it; and (3) that all prior parties had capacity to contract. If the sole warranty were one of title there would be no reason for warranties (1) and (3). If an instrument "is genuine and in all respects what it purports to be", the prior endorsements must all be genuine. Where one of the endorsements is forged, the instrument is no longer genuine, for the signatures of all prior parties are inherent factors in the instrument. The holding of the court below amounts to a ruling that all subsections of Section 115 of the Negotiable Instruments Law of New York, except Subsection 2, are mere verbiage. Obviously they are not intended to be such, and the only way in which all the subsections of Section 115 can be given legal significance is to hold that the endorser warrants that all prior signatures, including endorsements, are genuine.

The courts of New York have held, under this section, that an endorser guarantees the genuineness of the signature of prior endorsers. *Packard* v. *Windholz,* 88 App. Div. 365, 366, affirmed, 180 N. Y. 549; *Oriental Bank* v. *Gallo,* 112 App. Div.

360, 362, affirmed, 188 N. Y. 610; *Geering* v. *Metropolitan Bank,* 170 App. Div. 751, 753, affirmed, 225 N. Y. 711. This Court has followed the same rule without the aid of the statute, *United States* v. *National Exchange Bank,* 214 U. S. 302, 319, as the Court of Appeals of New York did before the statute was passed, *Turnbull* v. *Bowyer,* 40 N. Y. 456, 460. If there were any doubt about the effect, in that respect, of a simple general endorsement, it would seem to be removed by the special stamping "prior endorsements guaranteed."

The Treasury Department circular in force at the time (R. 9–11) required that checks on the Treasurer of the United States, presented to Federal Reserve Banks for payment, must be "properly indorsed by responsible incorporated banks and trust companies who guarantee all prior endorsements thereon." The respondent had knowledge of this circular when it dealt with the check in question (R. 12) and the form of its endorsement (if differing at all from that commonly in use by it) was evidently directed to the requirements of the circular. The words "prior endorsements guaranteed" can only mean one thing. They are not a warranty of title, which is warranted by the mere fact of transfer, but are a guarantee of "prior endorsements"; that is, of their genuineness. A bank endorsing in this form warrants the authenticity of the penmanship of prior endorsements, quite as much as its own title. Authenticity of the

penmanship is, of course, used in the sense that in addition to the endorsement of the payee, there is also comprehended the endorsement of someone whom the law considers to have authority to sign for him.

Independently of the obligations of the respondent under the Negotiable Instruments Law of New York under its guarantee of all prior endorsements, the respondent by presenting its check to the Federal Reserve Bank of New York in accordance with the Treasury regulation discussed, *supra,* thereby contracted with the United States that as a consideration for the cashing of the check it guaranteed all prior endorsements and not merely that it had title to the check. In honoring the check, therefore, the United States was relying not merely upon the obligations imposed upon the respondent by the Negotiable Instruments Law of New York, but also and more specifically upon the exact type of endorsement which it required as a condition precedent to the payment of the check. The regulations specifically provide that all prior endorsements must be guaranteed by the collecting bank and not merely that the bank have title to the instrument.

The reasonableness of such a requirement is evidenced by the situation here presented. The Government yearly mails great numbers of checks to payees both in this country and abroad. In many instances the checks are given for the purpose of

discharging existing obligations of the United States, which obligations, if not discharged, could be enforced against it. If, therefore, title be acquired to a check in a manner such as herein appears, and the Government pays that check without extinguishing the obligation for the discharge of which it was issued, serious and heavy losses might be sustained by the United States. When, in order to preclude the possibility of such losses, it requires that all prior endorsements be guaranteed, it is not merely concerned with the title to the instrument; it is seeking to protect itself against double liability, as it has not only the right but the duty to do.

The payee's endorsement having been forged and the check having been paid under a mistake as to the genuineness of the signature of the payee, the amount of the check is recoverable by the United States from the respondent. *United States* v. *National Exchange Bank*, 214 U. S. 302; *United States* v. *Chase National Bank*, 252 U. S. 485, 493; *First National Bank* v. *Whitman*, 94 U. S. 343.

It is submitted that the decision of the court below, insofar as it failed not only to give effect to all the provisions of the Negotiable Instruments Law of New York, with respect to the guarantee of prior endorsements, but particularly its failure to recognize that the United States required a guarantee of all prior endorsements as a condition precedent to payment of its checks, was incorrect.

CONCLUSION

We submit that the decision of the court below is incorrect and should be reversed.

Respectfully submitted.

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OCTOBER 1934.

APPENDIX

STATUTES

Title 22, Sections 24, 60, and 91, of the Code of Laws of the District of Columbia provides as follows:

SECTION 24

Where a signature is forged or made without the authority of the person whose signature it purports to be it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority.

SECTION 60

Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferrer had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferrer. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.

> The drawer, by drawing the instrument, admits the existence of the payee and his then capacity to indorse, and engages that on due presentment the instrument will be accepted and paid, or both, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it. * * *

Section 116 of the Negotiable Instruments Law of New York provides as follows:

> Every endorser who indorses without qualification, warrants to all subsequent holders in due course:
>
> (1) The matters and things mentioned in subdivisions one, two, and three of the next preceding section; and,
>
> (2) That the instrument is at the time of his endorsement valid and subsisting.

The "matters and things mentioned in subdivisions one, two, and three" of Section 115 are as follows:

> (1) That the instrument is genuine and in all respects what it purports to be;
>
> (2) That he has a good title to it;
>
> (3) That all prior parties had capacity to contract.

U. S. GOVERNMENT PRINTING OFFICE: 1934.